

No. 12,706

IN THE

United States Court of Appeals  
For the Ninth Circuit

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JOSHUA HENDY CORPORATION (a Corporation), sued herein as Pacific Tankers, Inc. (a Corporation),

*Appellant,*

VS.

OTTO GEORGE CLAVEL,

*Appellee.*

APPELLANT'S OPENING BRIEF.

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**APPELLANT'S OPENING BRIEF.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal in Admiralty from a final decree entered by the United States District Court for the Northern District of California, Southern Division, in an action for damages by reason of personal injuries sustained by appellee, Clavel, for alleged failure of respondent, through its officers, to render medical care and attention to him.

Final decree was entered on the 23rd day of June, 1950, and stipulation for amendment of final decree was entered July 23, 1950. (Ap. 21.)

Petition for appeal and allowance thereof was filed July 21, 1950. (Ap. 27.)

Notice of appeal was filed on July 21, 1950. Apostles on appeal and praecipe therefor were filed on July 21, 1950. (Ap. 28, 29.)

Citation on appeal was filed on July 21, 1950. Assignment of errors was filed on October 19, 1950. Bond on appeal was filed on the 21st day of July, 1950. (Ap. 31.)

Jurisdiction of admiralty and maritime causes is vested in the Courts of the United States (28 U.S.C. 1333), under the Jones Act. (46 U.S.C. 688.)

This Court had jurisdiction to review the final decree of the District Court. (28 U.S.C. 1291.)

The libel originally named the United States of America as a party respondent in addition to appellant. At the time of trial the United States of America was dismissed by stipulation of counsel. At the time that the action was filed the appellant corporation operated under the name of Pacific Tankers, Inc. Prior to the time of trial the name of the appellant corporation was changed to Joshua Hendy Corporation, a corporation, and an oral stipulation was entered into by counsel to this effect. A written stipulation to the same effect was later entered. (Ap. 26.)

**STATEMENT OF CASE.****A. The question involved.**

*Must a vessel always deviate to obtain medical treatment for a minor injury to a seaman's finger, where such deviation in the conscientious and best judgment of the Master is unnecessary?*

It is appellant's contention that the employer is not liable under the facts of the case at bar, for one or more of the following reasons:

(a) The appellant cannot be held responsible for an error of judgment on the part of its officers if their judgment is conscientiously exercised with reference to the treatment of the injury sustained by the seaman, and with reference to the conditions existing at the time.

(b) That the appellant is not liable for depletions in the stock of the medicine chest of the vessel with respect to certain drugs carried therein if appellant does not have an opportunity to replace or replenish the depleted supply.

(c) That the appellant cannot be held liable for failure to deviate where the injury was slight and where the medical care furnished the seaman was the ordinary and recognized treatment.

These questions arise because of the decree against appellant, and the findings of the Court below, that appellant was negligent.

**B. The pleadings.**

The libel alleges that the United States of America was the owner of the tanker "Pecos", and that the vessel was being operated by appellant, Pacific Tankers, Inc.; that the appellee was a seaman, to-wit, a bosun, aboard the "Pecos" and that on April 22, 1948 suffered an injury when he scratched his index finger, and as a result of said scratch said finger became infected, and that the treatment by the Mate and the Master was not beneficial and further that the appellee requested the Master and Mate to provide him with adequate skilled medical attention but none was provided until the vessel arrived at Japan. (Ap. 5.)

Appellee alleges that it has been necessary to amputate a portion of the appellee's index finger, and that the remaining portion of the finger is sensitive, and the movements of the second and third fingers of his right hand have been impaired. (Ap. 5.)

Insofar as the appellant is concerned, all of the material allegations of the libel have been denied by the appellant, with the exception of the allegation that appellant was the operator of said vessel and the employer of said appellee. (Ap. 7.)

The United States of America is not a party to this appeal having previously been dismissed at the inception of the trial of the action. (Ap. 34.)

**C. The evidence.**

In 1948 appellee Clavel was the bosun of the vessel "Pecos", a tanker, which sailed from San Francisco

to Yokosuka, Japan, shuttled between the Persian Gulf and Japan, and returned to the United States; he was sixty-one years of age, having gone to sea for some forty-seven years and having acted in the various capacities of able-bodied seaman, quartermaster and bosun aboard vessels. (Ap. 35.) During the course of the voyage from the Persian Gulf to Japan and on April 23, 1948, appellee Clavel was making an awning for the poop deck of the vessel, and had fashioned a sail needle out of a nail; during the course of his work he scratched his right index finger with the nail. (Ap. 36.) He first complained to Captain Johnson on April 25, 1948 that he suffered an injury to his index finger. (Lib. Exh. 1b, p. 15; Resp. Exh. B.) Captain Johnson referred him to Mr. Coward, the Chief Mate, who looked at his finger, and the Chief Mate and Captain Johnson ordered epsom salts solution treatment in the form of hot soaks; Ichthymol ointment was also applied. (Lib. Exh. 1a, p. 7 and 8; Lib. Exh. 1d, p. 5.)

Coward, the Chief Mate, checked daily to see that the appellee was soaking his hand, and subsequently lanced the finger, drew out some pus and put on drawing salve; after the finger was lanced the finger was still slightly swollen. (Lib. Exh. 1d, p. 5 and 6.) The lancing of the index finger of appellee took place on the 27th or 28th of April, and at that time there was no evidence of any blood poisoning. Although the finger was swollen, the Captain did not consider its condition serious enough to divert the ship as the

vessel was then only four days from its destination in Japan. (Lib. Exh. 1b, p. 16, 18.)

Captain Johnson and the Chief Mate Coward were not requested by appellee to divert and put appellee ashore or to radio for any medical advice (Lib. Exh. 1d, p. 6; 1a, p. 12); nor did appellee ever make any complaints to Captain Johnson about the type of treatment he was receiving. (Lib. Exh. 1a, p. 9.) On April 27 the "Pecos" was progressing northward in the China Sea toward Japan; on April 28 the "Pecos" was 260 miles northwest of Manila; this was the closest point it got to a port before arrival in Japan. On April 29 the "Pecos" was some 570 miles northwest of Manila. On the 28th and 29th of April the "Pecos" was some four days from Japan. The vessel arrived at a port in Japan on May 3, 1948. (Lib. Exh. 1b, Map p. 14.)

From the time that the finger was first treated by the ship's officers until the vessel arrived in Japan, there was no crook or stiffness of the right index finger. Appellee was up and about the vessel daily during the time his hand was being treated. (Ap. 124.) A record of the medical care and attention and treatment afforded appellee was kept in the medical log aboard the vessel. From the testimony of Robert C. Taylor, the medical log could not be found at the time of the trial of the action. However, Mr. Taylor testified that he had copied the entry in the medical log concerning the care and treatment of Clavel. (Ap. 137; Resp. Exh. B.) The date of the first treatment

to Clavel was April 25, 1948, at which time his hand was bandaged with Ichthymol ointment, and he was also given hot epsom salts compresses. From and after that date he was treated daily. On April 27 and 28 appellee was given phenobarbital at night. His finger was also treated and dressed on these days. On April 30 appellee's finger was again treated and dressed, and daily treatment continued until May 3, on which day the vessel arrived in Japan. Appellee was taken to a U. S. Navy hospital, where he remained from May 4 to May 7. After his return to the vessel May 8, his hand was dressed daily up to the date of May 20, the date of arrival at San Pedro. (Ap. 139, 140.)

While the "Pecos" was on the "shuttle run" the vessel "Pecos" made no regular ports of call or stops between Japan and the Persian Gulf. (Lib. Exh. 1b, p. 15.)

Gardner, the second officer of the vessel, testified that at the commencement of the voyage of the "Pecos" there was a goodly supply of penicillin and sulfa drugs aboard the vessel, but that the supply became depleted after leaving the Persian Gulf and before arrival in Japan, because of the unusual demands by the crew. It was his recollection there was no penicillin aboard the vessel between April 24 and May 2. (Ap. 131, 132.)

When the vessel arrived at Japan on May 3, the appellee was hospitalized and before the ship left Japan about May 28 he requested that the chief mate

come and get him so that he could return to the United States on the vessel (Lib. Exh. 1d, p. 7); at no time during the return voyage from Japan to the United States did appellee ever complain that he was not getting the proper care. (Lib. Exh. 1d, p. 8.)

Appellee's right index finger was amputated through the distal portion of the proximal phalange in August, 1948. He claims that he has a disturbance of the function in the grip of his hand due to a loss of a portion of the index finger, and some restriction in the motion of the adjacent fingers, and also complains of some pain in the amputated stump. Appellee returned to work the 2nd day of March, 1949.

Dr. Francis J. Cox, called as a witness by appellee, testified that he first saw appellee on February 25, 1950 and obtained a history from him concerning the injury received in April, 1948. He testified as to the grip function and the amputation. (Ap. 59.) He stated that penicillin was a recognized treatment for virulent infections. He further testified that there were no neuromas involved in the amputated stump and that the appellee has a lack of 35% grip in the right hand. (Ap. 66.) He further testified that if there were no penicillin or sulfa drugs in the medicine chest of the vessel and that a seaman incurred an infection which did not appear to be serious, the treatment indicated would be bed rest and application of hot soaks to the infected parts; that the continuing of epsom salts soaking treatment was a proper one and in the event that the infection came to a head it would be proper

to lance it to relieve the pressure; that further soaking would reduce the edema in the hand and fingers where the infection was present. (Ap. 67, 68.)

Dr. Merrill Mensor, called by appellant, testified that he examined the appellee and took a history from him; that he found that the appellee had a partially amputated right index finger and that he had a residual stump of  $1\frac{1}{2}$  inches, measured from the web of the finger to the end of the stump; that the stump was not tender, and in his opinion very satisfactory as far as the finger was concerned. (Ap. 82.) He further testified that the appellee had a loss of 25 to 30% grip in his right hand. (Ap. 86.) In response to a hypothetical question, Dr. Mensor testified that if a seaman incurred an infection of a finger or hand while aboard a vessel and, if there was no penicillin aboard the vessel and the seaman was afforded treatments of hot epsom salts soaks, it would be his opinion that the seaman was not seriously or dangerously ill, and had been afforded the proper and recognized treatment. (Ap. 88, 89.) Dr. Mensor further testified that if he were called by a vessel by radio service to give medical advice in the treatment of an infection such as appellee had, his instructions to the vessel would be identically that course of treatment which was given to the appellee by the officers on the vessel "Pecos." (Ap. 90.)

**SPECIFICATIONS OF ERROR RELIED UPON.**

The assignment of errors upon which appellant relies is set forth in the Apostles at pages 160 and 161, and is summarized in the following statement of questions involved in the appeal of said appellant:

1. Appellant contends that there is no evidence in the record sufficient to sustain the findings in favor of the appellee on the proposition that the appellant negligently failed to provide the vessel with an adequate medicine chest.

2. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the ground that appellant failed to replenish the medicine chest at ports of call.

3. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the ground that appellant was negligent in failing to avail itself of medical advice by means of radio service.

4. Appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee on the proposition that appellant negligently failed to divert the vessel and put in at the port of Manila.

5. That the trial Court committed error in its findings of fact and conclusions of law by adopting the findings proposed by appellee. (Ap. 18, 19.)

### ARGUMENT OF THE CASE.

1. APPELLANT CONTENDS THAT THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN THE FINDINGS IN FAVOR OF THE APPELLEE ON THE PROPOSITION THAT THE APPELLANT NEGLIGENTLY FAILED TO PROVIDE THE VESSEL WITH AN ADEQUATE MEDICINE CHEST.

Title 46, U.S.C.A. 666 provides as follows:

“Every vessel belonging to a citizen of the United States, bound from a port in the United States to any foreign port, or being of the burden of seventy-five tons or upward, and bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall be provided with a chest of medicines; \* \* \* shall also be provided with, and cause to be kept, a sufficient quantity of lime or lemon juice, and also sugar and vinegar, or other anti-scorbutics \* \* \*”

Title 46, U.S.C.A. 667 provides as follows:

“If, on any such vessel, such medicines, medical stores, lime or lemon juice, or other articles, sugar, and vinegar, as are required by Section 666 of this title, are not provided and kept on board, as required, the master or owner shall be liable to a penalty of not more than \$500; \* \* \*”

There is nothing contained in the above-quoted statutes with respect as to what medicines should be kept in the medicine chest of a vessel, except that it states that the vessel “shall be provided with a chest of medicines” and further provides that “a sufficient quantity of lime or lemon juice, and also sugar and vinegar, or other anti-scorbutics” be served to each seaman.

The libel contains no allegation concerning an inadequate medicine chest or the failure of the vessel to maintain an adequate medicine chest. (Ap. 3, 7.) This charge of negligence first appears in the findings of fact. (Ap. 18.) The appellee at the conclusion of the trial of the case before the district judge, did not ask for leave to amend his libel to conform to the proof.

The first time that appellee raised the question as to the adequacy of the medicine chest was at the time of trial when counsel for appellee brought forth this particular line of testimony from the appellee as well as from Dr. Cox. Johnson, the Master of the vessel, and Coward, the Chief Mate of the vessel, were not present at the time of trial, their depositions having been taken in anticipation of trial, due to the fact that they would not be within the jurisdiction of the Court during the trial. The question of inadequacy of the medicine chest was never raised by counsel for appellee during the questioning of Captain Johnson or Chief Mate Coward. At the time of trial counsel for appellant had no opportunity to rebut the testimony of appellee and Dr. Cox on this point as the question had not been raised at the time the depositions of Johnson and Coward were taken. Counsel for appellant attempted to elicit some information along this line from Mr. Gardner, the Second Mate of the vessel, but as he was not the medical officer aboard the vessel his testimony did not shed much light upon this point. The issue of inadequacy of the medicine chest was not therefore properly before the Court, inasmuch as

it was not an allegation of negligence charged against the appellant in the libel, and such evidence should not be considered by this Court. *Welch v. Fallon*, 181 Fed. 875, at page 878.

There are no cases which hold that there has to be any particular type of medicine or drug in the medicine chest of a vessel. The statutes above cited are safety statutes, and merely require a medicine chest to be kept aboard a vessel where a doctor or physician is not in attendance aboard said vessel. This duty to furnish a medicine chest arises out of the ancient duty of the owner of the vessel to furnish "cure" to an injured seaman.

*Laws of Oleron*, Art. VI and VII;

*Aguilar v. Standard Oil Co.*, 318 U.S. 724;

*The Osceola*, 189 U.S. 158.

- 
2. THE APPELLANT CONTENTS THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN FINDINGS IN FAVOR OF APPELLEE ON THE GROUNDS THAT THE APPELLANT FAILED TO REPLENISH THE MEDICINE CHEST IN PORTS OF CALL.

The testimony in this regard is to the effect that when the vessel left ports of the United States for Japan, there was an ample supply of gauzes, drugs, tablets, penicillin and sulfa aboard the vessel, and placed in the medicine chest; that the penicillin and sulfa drugs were plentiful when the vessel arrived at Japan the first time (Ap. 131); and that when the vessel left Yokosuka, Japan, for the Persian Gulf, the penicillin was used for the first time as some of

the men had contracted venereal diseases (Ap. 131, 132.) The vessel ran out of penicillin on the return voyage from the Persian Gulf to Japan; after the vessel arrived at Japan penicillin was obtained in Japan for treatment of seamen on the voyage from Japan to the United States. (Ap. 131.) There is no evidence in the record that failure to use penicillin was the proximate cause of appellee's present condition.

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**3-4. APPELLANT CONTENDS THERE IS NO EVIDENCE IN THE RECORD SUFFICIENT TO SUSTAIN FINDINGS IN FAVOR OF APPELLEE ON THE GROUND THAT APPELLANT WAS NEGLIGENT IN FAILING TO AVAIL ITSELF OF MEDICAL ADVICE BY MEANS OF RADIO SERVICE OR DIVERT THE VESSEL TO THE PORT OF MANILA.**

Prior to the time that Clavel received the injury to the finger of his hand the "Pecos" was bound from the Bahrein Islands in the Persian Gulf to Yokosuka, Japan. (Libellant's Exh. 1b, p. 5, 6.) Captain Johnson testified that on April 28, 1948, the "Pecos" was at its closest point to Manila, a distance of some 260 miles; that on April 29, 1948, the vessel was some 570 miles distant from Manila, and that on April 30 the vessel was some 900 miles distant from Yokosuka, Japan. Following April 30, 1948, the vessel proceeded on its course to Japan, arriving there on May 3, 1948. The medical log which was read into evidence shows that on April 27 and April 28, 1948, appellee's hand was drained and dressed, and that on succeeding days up to May 3 appellee's hand was drained and dressed. Captain Johnson, master of the vessel, had training as

an orderly in various hospitals and had taken part in preparation for operations, cauterizing and irrigations. (Lib. Exh. 1a, p. 4.) Captain Johnson considered that the usual treatment for scratches to fingers and infected parts which became swollen and red was the application of hot epsom salts solution to draw out the inflammation and to cause the swelling to subside. (Lib. Exh. 1a, p. 8); that the appellee's hand and finger never at any time showed any evidence of blood poisoning (Lib. Exh. 1b, p. 16); that he never considered the condition of the finger serious enough to divert to any port. (Lib. Exh. 1b, p. 16 and 18.)

Both Dr. Cox and Dr. Mensor agreed that applications of hot epsom salts solution to the injured finger of appellee would draw the infection to a head and that when the infection came to a head the proper treatment would be to lance the same to prevent the further spread of infection, and that further soaking would reduce the edema in the hand and finger. (Ap. 67, 68, 89, and 90.) It was the testimony of Dr. Mensor that the master and chief officer of the vessel rendered and afforded proper treatment to the appellee in curbing the infection in his finger and hand; he further stated that if a radio message were directed to him as to the treatment to be given an infection of this nature he would have prescribed the same treatment as was provided, and further testified that such treatment was appropriate and proper. (Ap. 89, 90.)

5. THERE IS NO EVIDENCE IN THE RECORD TO SUSTAIN THE FINDINGS IN FAVOR OF APPELLEE THAT APPELLANT FAILED TO RENDER PROPER MEDICAL CARE AND ATTENTION.

The injury sustained by appellee was, to all outward appearances, a minor one and was not serious by any nature or stretch of the imagination. The vessel was on its way to Japan, and at the time appellee first received a scratch on his finger the vessel was some nine days from the port in Japan to which it was bound. When appellee first presented himself for treatment on April 25, the finger appeared to be scratched and the injury a minor one. The appellee was given the recognized treatment by the medical officers of the vessel. Appellee was hospitalized at Japan, but rejoined the vessel at his own request when the "Pecos" left Japan bound for the States. The appellee's finger was dressed and treated on the return voyage from Japan to the United States. In August, 1948, an amputation of the portion of the right index finger was performed. The fact that appellee suffered an amputation some three months *after* the injury to the finger was not foreseeable at the time he received his injury. The injury was a minor one, which, in the exercise of reasonable judgment on the part of the captain was not sufficient to cause a diversion or to radio for medical advice as the captain had the matter of treatment well in hand. The vessel is not an insurer of the safety of every seaman who receives a minor scratch or cut. Hindsight cannot be the basis of liability for failure to render medical care and attention in a case where the orig-

inal injury is minor in nature and one which could be well taken care of by treatment aboard the vessel.

In the case of *The Iroquois*, 194 U.S. 240, the master of a sailing vessel bound for San Francisco was not chargeable with fault in failing to put back a distance of 480 miles from the place of the accident to Port Stanley, to secure surgical attendance for a seaman who was disabled by an accident while the vessel was rounding Cape Horn. In that case it was held as follows:

“What is the measure of the master’s obligation in cases where the seaman is *severely injured* while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own peculiar facts that the rule laid down in one may afford little or no aid in determining another, depending upon a different state of facts.” (Emphasis added.)

It has been stated on numerous occasions that the measure of the master’s obligation in cases where a seaman is *severely injured* while the ship is at sea depends largely upon their own particular facts.

*Brock v. Standard Oil Company of New Jersey*,  
33 Fed. Supp. 353;

*Barlow v. Pan Atlantic S.S. Corporation*, 101  
Fed. (2d) 697 (C.A. 2);

*The Iroquois*, 194 U.S. 240;

*The Shenandoah*, 134 Fed. 304.

The master is merely required to exercise reasonable judgment in determining the extent of a seaman’s injuries and in determining the necessity of

diverting the vessel and placing him under the care of a physician at some near port. This raises three questions: (1) The seriousness of the injury; (2) the judgment of the master as to deviation, and (3) the probability of obtaining medical attention at the port of diversion.

In *The Shenandoah*, 134 Fed. 304, a seaman received a lesion in the region of his hip joint which was not apparent and could not have been discovered except by a surgeon, although in fact the libelant's injury was serious and painful. The Court, in commenting upon the exercise of reasonable judgment on the part of the master stated as follows:

“The master was only required to exercise a reasonable judgment as to the extent of libelant's injuries, and as to the necessity of placing him under the care of a physician at some near port. In the case of *The Iroquois*, 113 Fed. 964, the court, in discussing the extent of the master's obligation when a seaman is injured at sea in the discharge of his duties, said:

‘Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life

or limb; and he cannot be charged with negligence simply because he erred in judgment as to the necessity for putting into port, when the nature of the disease, or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon.' "

In the case of *Barlow v. Pan Atlantic S.S. Corporation*, 101 Fed. (2d) 697 (C. A. 2), the plaintiff seaman fell while on the vessel, injuring himself. One of the officers took the plaintiff to the first mate's room and another seaman was placed in the room and told by the officers to watch the injured seaman. The following day the injured seaman was taken to the Marine Hospital, where he complained of soreness in his chest, and it was then determined that he had received a serious injury to the brain and spinal cord. The injured seaman brought an action against the defendant steamship company, alleging, among other counts of negligence, that of failure to provide prompt, adequate and proper medical treatment. The Court denied liability for this cause of negligence, stating as follows:

"The argument is that the libellant's injuries were aggravated by failure to send him to the hospital until the following morning and that second mate Ellis was negligent in not realizing the severity of the injury and summoning the hospital ambulance at once. But on the evidence we can find no evidence of negligence. Barlow received the ordinary type of simple first aid treatment, which is all that can reasonably be ex-

pected from officers of a vessel having no professional doctor. After bathing and attempting to sterilize the wounds, Ellis suggested calling the ambulance, but Barlow protested against being sent to a hospital. He was able to walk back to his quarters in the forecastle and Ellis took this as evidence that he did not require hospitalization. Not every broken head, even if the blow is severe enough to render the victim temporarily unconscious, requires professional medical attention. Barlow had quickly come to, and after treatment was able to talk rationally and to walk to his quarters. Ellis also took the precaution to warn Barlow's roommate to keep an eye on him and to report if he became restless or suffered pain during the night. While a trained physician might have realized the advisability of sending the wounded man to a hospital at once, a ship's officer cannot be held to the same standard of skill as a professional medical man. Ellis showed as much care and judgment as can reasonably be expected under the circumstances. Hence the cause of action alleged in the second count was not proved."

The case which is nearly on all fours with the matter at bar is that of *Brock v. Standard Oil Company of New Jersey*, 33 Fed. Supp. 353. In that case the injured seaman brought an action for damage on three counts, the second count alleging that the vessel failed to provide proper medical and surgical care and attention. The libelant became involved in an argument with another seaman and as a result injured his hand. The injured seaman went to the Captain's quarters shortly after midnight to get a

certificate of admission to the Marine Hospital and returned to the vessel after being refused admission to the Marine Hospital. The captain of the vessel supplied libellant with epsom salts and unguentine and gave him instructions as to the treatment of his hand. The vessel left the port where it was loading and during the voyage from Everett, Massachusetts to New York the libellant performed his regular duties. The libellant was given daily treatments by the captain, and was instructed to soak his hand in a hot solution of epsom salts. The voyage from Everett, Massachusetts to New York took a little more than three days, and when the vessel arrived at New York libellant went to the Marine Hospital on Staten Island where his injury was diagnosed as a fracture of the thumb of the left hand. In denying liability on the count for failure to provide proper medical and surgical care and attention, the Court stated as follows:

“I also find as a fact that the respondent was unaware of the extent of libellant’s injuries, and that the respondent gave adequate attention to the libellant during the course of the voyage to New York under the circumstances. It was not until after the completion of the voyage that it was learned that the libellant’s thumb was fractured.”

In *Brock v. Standard Oil Company of New Jersey* (supra), the injury was one involving the hand, as in the case at bar; the treatment offered and rendered by the vessel was the same as in the instant case; the resultant effect of the injury was not apparent in either the case at bar or the *Brock* case until a later date.

In the case of *The Van Der Duyn*, 261 F. 887, a seaman was injured on board a vessel while the vessel was at sea. Approximately five days later the vessel arrived at Cuba, where the seaman was examined by a doctor but not sent to a hospital, and the seaman returned to the vessel for a voyage to New York. Approximately two weeks after the accident the seaman was taken to a hospital in New York for x-rays, and a fracture of the arm was revealed by the x-rays. The seaman brought an action for failure to give medical care and attention. The Court held that while the ship's officers had made an error of diagnosis, at the same time they had exercised the reasonable care which was required of the officers of a vessel and stated as follows:

“The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time. It is only where the external extent of the injury in question should have moved them to ascertain its real nature, when they could do so without serious diversion of the course, and at comparatively trivial expense, that the courts have permitted liability to attach to the vessel.”

The Court further stated as follows:

“The requirement of a ship is to give reasonable medical treatment under all circumstances. There must be reasonable ground to believe that consequences more serious than the swelling, pain, and suffering which ordinarily attend a fracture or a severe laceration resulted, before liability be imposed.”

**CONCLUSION.**

It is respectfully contended that the appellant has sustained its burden of demonstrating that the final decree entered in favor of appellee Clavel against appellant Joshua Hendy Corporation was a miscarriage of justice and that this Honorable Court, in the exercise of its powers as an Appellate Court and as a Court empowered to consider all of the facts on trial *de novo*, should make and enter a final decree in favor of appellant Joshua Hendy Corporation, reversing the decree heretofore entered in favor of appellee Clavel.

Dated, San Francisco, California,  
February 5, 1951.

Respectfully submitted,

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